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No. 80-1687

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
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1. Petitioner Western Union Telegraph Company ("Western Union") uses facilities provided by American Telephone and Telegraph Company ("AT&T") and its affiliated companies (collectively, "Bell") to supplement its own system in providing common carrier communications services throughout the United States, in competition with Bell. Prior to October 1, 1978, the Bell facilities were provided to Western Union pursuant to contractual arrangements.

During June and July of 1978, Bell filed with the Federal Communications Commission tariffs that would replace the contracts with rates that were approximately 150% higher. Although the FCC's Rules and Regulations require carriers to submit economic data to support all rate increases, 47 C.F.R. 61.38, Bell, by obtaining a waiver from the Commission, was excused from submitting such data.

Western Union unsuccessfully petitioned the Commission to reject the tariff filings, and then sought review in the United States Court of Appeals for the District of Columbia Circuit. The United States supported Western Union and argued that the Commission had abused its discretion by refusing to reject the tariff. The case was argued together with *Aeronautical Radio, Inc.* v. *FCC*, No. 77-1333 (D.C. Cir.). On November 5, 1980, the court of appeals ruled in *Aeronautical Radio* that the Commission's refusal to reject a tariff terminating AT&T's Telpak bulk rate for private line service was an unreviewable decision. Two months later, on January 13, 1981, the court dismissed Western Union's petition for review in a one-paragraph order. The Commission rate investigations that, in principle, encompass Western Union's claims have been dormant for four years (Pet. 4).

2. We continue to believe that the Commission abused its discretion in granting the waiver. Less than a month ago, however, this Court denied our petition for review of the court of appeals' holding that the Commission's refusal to reject the Telpak termination tariff, although not accompanied by supporting data, is unreviewable. *United States* v. *FCC*, No. 80-1408 (Apr. 20, 1981); see also *Aeronautical Radio, Inc.* v. *FCC*, No. 80-1343 (Apr. 20, 1981); *General Electric Co.* v. *FCC*, No. 80-1683 (May 4, 1981). As petitioner recognizes, the present case raises primarily the same issues as were involved in the *Telpak* cases. In light of the Court's action on those petitions, we cannot ask the Court to grant certiorari in this case.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981